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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 957

UNITED STATES STEEL CORPORATION,
Petitioner,

vs.

JOHN GIGUERE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION.

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OPINION BELOW AND JURISDICTION.

The opinion below and jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

It is submitted that the questions presented to this court by the petition are more properly stated as follows:

1. Whether the Court of Appeals properly affirmed the trial court in refusing to submit to the jury the issue of alleged negligence on the part of plaintiff's employer?

2. Whether the Court of Appeals properly relied upon

the cases decided by the Supreme Court of Illinois and Illinois Appellate Courts construing section 5 of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. Ann. 1955, Ch. 48, sec. 138.5), and properly refused to delay its decision until such time as the Supreme Court of Illinois might decide an appeal in a pending case involving, among other issues, the construction of said section?

3. Whether the Court of Appeals properly held that there was evidence to support the jury's findings of negligence on the part of the defendant?

4. Whether the Court of Appeals properly held that there was evidence to support the finding of the jury that plaintiff was not guilty of contributory negligence?

STATUTES INVOLVED.

Section 5 of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1955, ch. 48, sec. 138.5) provides in part as follows:

> "Where the injury or death for which compensation is payable under this Act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative . . ."

STATEMENT OF THE CASE.

The statement of facts is set forth adequately in the opinion of the Court of Appeals:

The petition quotes a portion of the opinion reciting the facts of this case but omits the following pertinent paragraph of the opinion:

> "Morgan testified that he saw plaintiff working below when his crew was ready to lift the timber from the ground. He claims he hollered 'Watch out below,' which 'we always do when we bring something over.' Morgan admitted he didn't look to see if plaintiff moved after the alleged warning, and, in fact, he did not see plaintiff again until after he was injured. Biskner testified he did not see plaintiff and didn't know he was working below."

REASONS FOR NOT GRANTING THE WRIT.

I.

No Ground for Certiorari Is Shown: The Court of Appeals Construed Section 5 of the Illinois Workmen's Compensation Act in Accordance With Decisions of the Supreme Court of Illinois and the Illinois Appellate Courts and Properly Refused to Delay Its Decision.

This case is clearly not appropriate for certiorari. No federal question is presented; nor are the questions presented here of general importance and of public interest. This case and the questions involved are of interest only to the litigants.

The Court of Appeals did not decide the issues before it in conflict with state law. On the contrary, that Court followed the construction of section 5 of the Illinois Workmen's Compensation Act recognized by the Illinois courts since the Illinois Workmen's Compensation Act was enacted in 1913. The language in question has remained

practically unchanged since the statute was originally enacted, even though the statute has been amended from time to time. Whenever the language in question has been construed, both the Supreme Court of Illinois and the Illinois Appellate Courts have consistently held that an employee need not plead or prove his employer's freedom from contributory negligence in an action against a negligent third party. *O'Brien v. Chicago City Ry. Co.*, 305 Ill. 244 (1922); *Crosse v. Dealers Transport Co.*, 412 Ill. 179 (1953); *Hall v. Internat'l Mfg. Co.*, 14 Ill. App. 2d 5 (1957); *Manion v. Chicago, R. I. & P. R. Co., et al.*, 2 Ill. App. 2d 191 (1954); *Rabander v. Chicago Short Line Ry. Co.*, 19 Ill. App. 2d 29 (1958); *Johnson v. Farmer*, 319 Ill. App. 265 (1943); and *Moscarello v. Sheldon*, 247 Ill. App. 352 (1927).

In the case of *O'Brien v. Chicago City Ry. Co.*, 305 Ill. 244 (1922) the Supreme Court of Illinois confirmed the aforementioned proposition of law, and held that the statutory language involved in the case at bar did not abolish or modify the common law action which an injured employee has against a third party. The court stated, at page 263: "The same allegations and the same proof will sustain the action as would do so at common law." The cases cited above, together with the decision of the Illinois Appellate Courts in *Rabander v. Chicago Short Line Railway Company*, 19 Ill. App. 2d 29 (1958), are authoritative determinations of the question in issue here.

The Court of Appeals gave careful consideration to section 5 of the Illinois Workmen's Compensation Act as related to the question as to whether the negligence of plaintiff's employer was an issue for the jury, and that Court decided not to delay its decision until such time as the Supreme Court of Illinois might decide the *Rabander* appeal. The Court of Appeals stated in its opinion:

"Defendant next urges the trial court erred in refusing to submit to the jury the issue of contributory negligence of plaintiff's employer. Defendant insists that § 5(a) of the Illinois Workmen's Compensation Act (Ill. Rev. Stat. 1955, Ch. 48, Par. 138.5) is applicable, and that the cause now before us is preserved only if plaintiff's injury was not proximately caused by the employer or his employee. Defendant admits the evidence does not establish negligence by Sunnet Sollitt Company as a matter of law but insists the question should have been submitted to the jury. He relies upon *O'Brien* v. *Rautenbush*, 10 Ill. 2d 167, 139 N. E. 2d 222.

"The precise issue presented was recently decided by the Illinois Appellate Court, First Division, in *Rabinder* v. *Chicago Short Line Railway Company*, 19 Ill. App. 2d 29, 153 N. E. 2d 225. The arguments submitted to us in this case were made by the same attorneys as appeared for the defendant in the *Rabinder* case. The court there decided against defendant's position. The court said, at page 51:

> "'The purpose of section 29 is to require this indemnification of the employer who has not been negligent, out of the recovery against the third person whose negligence caused the injury.' This does not in any way put in issue lack of negligence on the part of the employer as a limitation upon the plaintiff's cause of action or as an additional requirement which the plaintiff has to meet before he can recover from the negligent third party."

"We think the *Rautenbush* case is distinguishable because it involved the right of an injured employee to maintain a common law action against a fellow employee. The language of that opinion must be construed in the light of the facts in that particular case. The court did not decide in *Rautenbush* whether the negligence of the employer was an issue in an action brought by an injured employee against a third party tort feasor. The court in *Rabinder* characterized the quotation from *Rautenbush* relied on by defendant as 'clearly dicta.'

"On oral argument, counsel informed us that the

Supreme Court of Illinois has permitted an appeal in the *Rylander* case. Nevertheless, we do not feel it advisable that we should hold up the decision of the case at bar until such time as the Illinois Supreme Court may decide the *Rylander* appeal. We do not know of any persuasive data which would lead us to believe that the Illinois Supreme Court would reverse the *Rylander* decision. *West v. American Telephone & Telegraph Company*, 311 U. S. 223, 236, 237.

"We therefore hold that the trial court did not commit error in failing to submit to the jury the issue of negligence by plaintiff's employer."

The Court of Appeals properly refused to defer its ruling in view of the decisions of the Illinois courts construing section 5 of the Illinois Workmen's Compensation Act. The cases cited in the petition at pages 11 and 12 are clearly not applicable to the question before this court, in that said cases involved state statutes, constitutional amendments, and rules of law which had never been construed by the respective state courts.

Petitioner asks that this Court grant certiorari in a case involving no federal question, on the ground that the Court of Appeals committed error in refusing to delay its decision on the remote possibility that the Supreme Court of Illinois might conceivably change the law in Illinois on a proposition that has been settled for over 35 years. It is submitted that if such action by the Court of Appeals constitutes error, then innumerable cases in the federal district and circuit courts could be delayed for months by a showing that a question of law involved in the federal court case is also pending in one of the state's several appellate courts or in the state supreme court.

II.

The Court of Appeals Properly Decided That:

(A) The Jury's Findings of Negligence on the Part of Defendant Were Supported by the Evidence;

(B) The Finding of the Jury That the Plaintiff Was Not Guilty of Contributory Negligence Was Supported by the Evidence.

Under the Illinois law the verdict of the jury must stand unless there is a *total failure* or *lack of evidence* to prove any essential element of the plaintiff's case. *Zivaldo* v. *W. J. Lynch Co.*, 365 Ill. 197 (1936). In response to special interrogatories propounded by the defendant the jury found defendant (a) carelessly and negligently allowed the block to remain insecure and unfastened to the overhead iron beam; (b) carelessly and negligently failed to keep a proper lookout for persons working below defendant's operation; (c) carelessly and negligently dropped a heavy wooden timber on the plaintiff; and (d) carelessly and negligently failed to warn the plaintiff concerning the dangers to which he was subjected (App. 377).

It is also clearly the law in Illinois that if there is *any* evidence from which the jury might infer that the plaintiff was in the exercise of due care for his own safety, the finding of the jury is conclusive. *Zivaldo* v. *W. J. Lynch Co.*, 365 Ill. 197 (1936). *O'Rourke* v. *Sproul*, 241 Ill. 576 (1909). *Bianchi* v. *Tait*, 366 Ill. 273 (1937). In response to a special interrogatory the jury found that at and immediately prior to the accident plaintiff was exercising reasonable care for his own safety (App. 377).

It is submitted that the facts as set forth in the opinion of the Court of Appeals support plaintiff's contention that this is a clear case of liability and that the overwhelming weight of the evidence sustains all of the findings of the jury.

On appeal the defendant contended that the evidence did not sustain the charges of negligence of which the jury found the defendant guilty, and that the plaintiff failed to prove his freedom from contributory negligence. The Court of Appeals carefully reviewed the facts, as appears from its opinion, and held that there was substantial evidence to support each of the four findings of negligence on the part of defendant and the finding that the plaintiff exercised reasonable care for his own safety. Petitioner requests this court to again review the questions as to the sufficiency of the evidence. It is submitted that such a review is not properly before this court on a petition for certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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